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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LONNIE WILLIAMS,

Plaintiff,

No. CIV S-11-0181 JAM DAD P

vs.

LEROY D. BACA et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. This proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 302 and 28 U.S.C. § 636(b)(1).

28 U.S.C. § 1915(g)

The federal in forma pauperis statute includes a limitation on the number of actions in which a prisoner can proceed in forma pauperis. The statute provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [§ 1915] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may

1 be granted, unless the prisoner is under imminent danger of serious
2 physical injury.

3 28 U.S.C. § 1915(g). “[T]he plain language of § 1915(g) requires that the court look at cases
4 dismissed prior to the enactment of the [Prison Litigation Reform Act] to determine when a
5 prisoner has used his three strikes.” Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th Cir. 1999).

6 For purposes of § 1915(g), the court must determine whether plaintiff has, on
7 three or more occasions prior to the filing of this new action, brought a civil action or appeal that
8 was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon
9 which relief could be granted. Where a court denies a prisoner’s application to file an action
10 without prepayment of fees on the grounds that the submitted complaint is frivolous, malicious
11 or fails to state a claim upon which relief may be granted, the complaint has been “dismissed” for
12 purposes of § 1915(g). O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008).

13 Here, court records reveal that plaintiff has accumulated well over three strikes in
14 the United States District Court for the Eastern District of California alone. For example,
15 plaintiff suffered a strike for purposes of § 1915(g) on January 29, 2002, when the district court
16 dismissed Williams v. Corcoran State Prison, No. CIV F-01-5926 AWI HGB (E.D. Cal.) for
17 failure to state a claim. He suffered another strike on February 28, 2002, when the district court
18 dismissed Williams v. Wood, No. CIV F-01-6151 REC LJO (E.D. Cal.) for failure to state a
19 claim. Plaintiff suffered yet another strike on August 16, 2002, when the district court dismissed
20 Williams v. Rendon, No. CIV F-01-5891 AWI SMS (E.D. Cal.) for failure to state a claim.

21 There is an exception to the three-strike bar of § 1915(g) which allows a prisoner
22 to use IFP status to bring a civil action despite three prior dismissals where the prisoner is under
23 imminent danger of serious physical injury. See Andrews v. Cervantes, 493 F.3d 1047, 1056-57
24 (9th Cir. 2007). However, the imminent danger exception applies only “if the complaint makes a
25 plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the
26 time of filing.” Andrews, 493 F.3d at 1055 (emphasis added). In this case, plaintiff alleges that

1 one or more of the defendants have been poisoning him by putting arsenic in his food. As
2 Magistrate Judge Moulds recently recognized in one of plaintiff's many cases filed with this
3 court, plaintiff has been alleging arsenic poisoning since 2006 and the plausibility of his claim is
4 belied by the fact that plaintiff remains alive today despite alleged arsenic poisoning for more
5 than five years by dozens of prison officials. See Williams v. Murray, Case No. CIV 11-0069
6 MCE JFM P (E.D. Cal.), Order filed June 10, 2011 (Doc. No. 9) at 3 (denying plaintiff's motion
7 for reconsideration of an order finding that § 1915(g) barred plaintiff from proceeding in forma
8 pauperis). The undersigned agrees with the observations of Magistrate Judge Moulds and finds
9 that the imminent danger exception under § 1915(g) is not available to plaintiff in this case in
10 light of the implausibility of his allegations regarding the danger posed to him.

11 Accordingly, under these circumstances, the undersigned will recommend that
12 plaintiff's motion to proceed in forma pauperis be denied and that this action be dismissed,
13 unless plaintiff pays the full statutory filing fee within the twenty-one-day deadline to file
14 objections to these findings and recommendations.

15 CONCLUSION

16 IT IS HEREBY RECOMMENDED that:

- 17 1. Plaintiff's motion to proceed in forma pauperis (Doc. No. 2) be denied; and
- 18 2. This action be dismissed without prejudice, unless plaintiff pays the full
19 statutory filing fee by the deadline for the filing of objections to these findings and
20 recommendations.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
23 one days after being served with these findings and recommendations, plaintiff may file written
24 objections with the court. The document should be captioned "Objections to Magistrate Judge's
25 Findings and Recommendations." Plaintiff is advised that failure to file objections within the

26 ////

1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 DATED: July 20, 2011.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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